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No. 96-6867

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JOSEPH ROGER O'DELL, III

Petitioner

v.

J. D. NETHERLAND, WARDEN, et al.

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

JAMES S. GILMORE, III
Attorney General of Virginia

***KATHERINE P. BALDWIN**
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 786-4624

***Counsel of Record**

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY

The petitioner argues in reply to the respondents' brief in opposition that the Fourth Circuit's decision was flawed because state courts in 1988 somehow were on notice that the rule announced in Simmons v. South Carolina, 512 U.S. 154 (1994), was required six years before. This position is wrong, not only for the reasons already given in the respondent's brief in opposition, but also for the reason ***Jonathan Dale Simmons himself gave to this Court in 1994 when he presented his case***.

In Simmons, the death-sentenced inmate argued eloquently ***for a change in the law***:

> In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n.30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed. ***In recent years,*** however, with the steady expansion of "life without parole" statutes, parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's lifelong parole ineligibility is withheld from the jury that must sentence him.

Simmons v. South Carolina, No. 92-9059, Brief for Petitioner at 16-17 (excerpt appended to this brief). Simmons' argument that "rules that once protected capital defendants" should be changed, is an obvious recognition by the very proponent of the "Simmons" rule that the rule he sought was "new."

In fact, Simmons even argued to this Court that an exception to his proposed new rule might make sense in States (like Virginia) where the Governor retains the power of commutation. Simmons v. South Carolina, No. 92-9059, Brief for Petitioner at 51, n.28 (excerpt appended to this brief). See Va. Const. Art. V § 12; Va. Code §§ 53.1-229, 230; Lee v. Murphy, 63 Va. (22 Gratt.) 789 (1872). The theory behind this argument was that a jury might be misled into thinking the defendant could not be released from prison by an instruction that he would be ineligible for parole if, in fact, the Governor could commute his sentence. The authority Simmons expressly relied on for his suggested exception, as well as for his recognition of the established practice he was asking this Court to change, was California v. Ramos, 463 U.S. 992 (1983): the very case the Fourth Circuit relied on to demonstrate that, in 1988, the "Simmons" rule was not dictated by existing precedent.

Inmate Simmons did not believe in 1994 that the rule he sought was compelled or dictated, and no federal appeals court or state supreme court thinks so now. This concordant evidence demonstrates both the correctness of the Fourth Circuit's conclusion in O'Dell's case and the lack of any compelling basis for certiorari review.

Respectfully submitted,

J. D. NETHERLAND, WARDEN, et al.,
Respondents herein.

By: Kathleen T. Baldwin
Counsel

JAMES S. GILMORE, III
Attorney General of Virginia

KATHERINE P. BALDWIN
Assistant Attorney General

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 92-9059

JONATHAN DALE SIMMONS,

Petitioner,

v.

SOUTH CAROLINA,

Respondent

On Writ of Certiorari
To the Supreme Court of South Carolina

BRIEF FOR PETITIONER

DAVID I. BRUCK *
Attorney at Law
(Appointed by this Court)

P. O. Box 11744
Columbia, South Carolina 29211
(803) 765-1044

M. ANNE PEARCE
Assistant Appellate Defender

1122 Lady Street
Suite 940
Columbia, South Carolina 29201
(803) 734-1330

ATTORNEYS FOR PETITIONER

* Counsel of Record

in this case a constitutionally-intolerable risk of an unwarranted or erroneous death sentence.

ARGUMENT

In California v. Ramos, 463 U.S. 992 (1983), the Court noted that many states prohibit capital sentencing juries from considering the availability of parole, pardon or commutation. 463 U.S. at 1013 n. 30. These state law rules developed in an era when release on parole was widely available for life-sentenced murderers, and the various states' prohibitions against instructions or jury argument concerning parole were designed to protect capital defendants from jury speculation concerning the likelihood of early parole release if the death penalty was not imposed.[10] In recent years, however, with the steady expansion of "life without parole" statutes,[11] parole for life-sentenced murderers has increasingly moved from a real possibility to a jury-room myth, unfounded in reality but ever-present in the deliberations of capital sentencing juries. And with this change, rules that once protected capital defendants from potentially harmful speculation now serve to increase the danger of death sentences based on jurors' misinformed fear of parole release. This case illustrates in stark form the unfairness that can result when the crucial fact of a defendant's

[10]See generally, W.E. Shipley, Annot., Prejudicial Effect of Statement or Instruction of Court as to Possibility of Parole or Pardon, 12 A.L.R.3d 832 (1967).

[11]See generally Wright, supra n.4, at 540-47 (describing and classifying various state life-with-parole statutory schemes).

lifelong parole ineligibility is withheld from the jury that must sentence him.

A. THE TRIAL COURT'S REFUSAL TO INFORM THE JURY OF PETITIONER'S PAROLE INELIGIBILITY, COUPLED WITH THE STATE'S EMPHASIS ON PETITIONER'S ALLEGED FUTURE DANGEROUSNESS, VIOLATED HIS DUE PROCESS RIGHT TO REBUT THE STATE'S CASE FOR THE DEATH PENALTY.

It would seem almost self-evident that the Eighth Amendment entitles a capital defendant to provide the sentencing jury with the most basic information concerning its non-capital alternative--namely, that state law will keep him in prison, and thereby protect society, if the jury spares his life. Yet the Court need not reach that issue in this case, and may choose not to do so, since the case can be decided on a narower ground. See, e.g., Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 827 n. 4 (1986); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 501-02 (1985), and authorities cited therein. Because the prosecutor at petitioner's trial argued for a death sentence specifically on the ground of petitioner's future dangerousness, the denial to petitioner of the essential means to meet that argument by informing the jury truthfully that a life sentence would permanently end such future danger amounted to a denial of due process in the fundamental sense of "'a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690 (1986).

1. The trial court's refusal to inform the jury of petitioner's parole ineligibility violated the rule of Gardner v. Florida.

Neither the Pennsylvania nor Virginia courts appear to have explained in any detail the reasons for their unusual position. Therefore, it is not possible to discern whether any peculiarity of Pennsylvania or Virginia law may justify the refusal of those states to inform capital sentencing juries of capital defendants' permanent ineligibility for parole.[28]

In sum, petitioner's request that the jury be told that a life sentence means life without parole would have been granted in all but a handful of jurisdictions. Indeed, in at least 20 life without parole states petitioner's request would have been unnecessary, because the trial judge would have submitted verdict forms to the jury making clear that the life sentence alternative

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treatment of this issue before O'Dell, see William W. Hood, III, The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605 (1989).

[28]One factor that might help to explain the position taken by the Pennsylvania and Virginia courts is that, in contrast to South Carolina, both states provide for gubernatorial commutation of prison sentences. Pa. Const. art. 4, §9(a) ("In all criminal cases except impeachment, the Governor shall have power . . . to grant . . . commutation of sentences" subject to recommendation of Board of Pardons); Va. Const. art. V, § 12 ("The Governor shall have power to remit fines and penalties . . . [and] to grant reprieves and pardons after conviction . . . "). Because a sentencing verdict of "life imprisonment without possibility of parole" might be deemed misleading where state law provides for the possibility of gubernatorial commutation, see California v. Ramos, 463 U.S. at 1009, it is perhaps arguable that a state may exclude all mention of post-conviction release in jurisdictions where such commutation is possible. But as noted previously, South Carolina is one of only two death penalty states in which sentences of life-without-parole may not be modified by gubernatorial commutation. Ala. Const. Amend. XXXVIII § 124 (governor may commute only death sentences); S.C. Const. art. IV, § 14 (same); see Wright, supra n. 4, at 550 n. 141.

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CERTIFICATE OF SERVICE

I certify that I am a member of the bar of this Court and that on December 12, 1996, I faxed and mailed, by United States Postal Service, a copy of the Respondents' Supplemental Brief in Opposition to Robert S. Smith, Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019-6064, counsel for the petitioner.

Katherine P. Baldwin
Assistant Attorney General